Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October Term, 1994

RHODA GROSSBARD, RHODA GROSSBARD
Conservator of the Property of
JULES GROSSBARD and DAVID GORDON
Petitioners,

v.

PRESIDENT CONTAINER, INC., MARVIN GROSSBARD, GEORGE GROSSBARD, MARVIN GROSSBARD and GEORGE GROSSBARD as Executors of the Estate of ROSE GROSSBARD, JILLDARVY REALTY CORPORATION
Respondents,

and

IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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34pp

QUESTIONS PRESENTED

1. Under the Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), Equal Protection and Due Process doctrines, where there has been no so-called " state action " by any private party and none alleged, may a United States District Court complaint, seeking remedies due to denied access to state judicial process for a hearing on the merits, be arbitrarily dismissed with prejudice, extinguishing thereby a petitioner's fundamental Constitutional rights ?

2. Does denial of a victim's rights, assured by Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), to meaningfully access judicial process for a hearing on the merits, thereby insulating admitted wrongdoers from remedies for looting, ongoing concealment frauds and other violations of ERISA, 29 U.S.C. 1001 et seq. and other law, also immunize them ?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this court. The named respondents are an interrelated group: two private corporations, President Container, Inc., a New York franchised, New Jersey situated corrugated box manufacturer, and one of President's cash flow derivative entities, Jilldarvy Realty Corporation, a New Jersey franchised real estate holding company, both controlled by George Grossbard and Marvin Grossbard, New Jersey residents, the two surviving, youngest of deceased Rose Grossbard's four children. Rose Grossbard's New Jersey estate has always been and remains inextricably intertwined.

Jules Grossbard was the eldest of Rose Grossbard's two other sons, both deceased. The petitioners, New York residents, are Rhoda Grossbard, Jules Grossbard's wife from 1938 and Conservator from 1980, and David Gordon, Jules Grossbard's eldest son.

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No. _____

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Petitioners,

v.

PRESIDENT CONTAINER, INC., MARVIN GROSSBARD, GEORGE GROSSBARD, MARVIN GROSSBARD and GEORGE GROSSBARD as Executors of the Estate of ROSE GROSSBARD, JILLDARVY REALTY CORPORATION
Respondents,

and

IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Rhoda Grossbard and David Gordon respectfully request that a writ of certiorari be issued to review the

judgement of the United States Court of Appeals for the Second Circuit entered on September 20, 1994.

OPINIONS BELOW

The misdated opinion of the United States District Court for the Southern District of New York, filed January 10,1994, is reported at 840 F. Sup. 296 (Pet. App. 5A). The September 20, 1994 opinion of the United States Court of Appeals for the Second Circuit is not reported (Pet. App. 3A).

JURISDICTION

The judgement and opinion of the Court of Appeals was entered September 20, 1994 (Pet. App. 3A). This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendment, Section 1. to the Constitution Of The United States, the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., and The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq. are involved with this matter, as hereinafter respectively indicated.

STATEMENT OF CASE

This petition adddresses the ultimate consequences of an " arbitrary " January 10, 1994 federal decision compounding " arbitrary " state decisions, each qualifying under the definition in United States v. Carmack, 329 U.S. 230, 243-44 n. 14 (1946). Such decisions are those that seem irrational because they conflict with factual records, conflict with statutes or precedents, or contradict themselves. Here every qualification has been exceeded, resulting in petitioners having never had a hearing on the merits in any jurisdiction.

The January 14, 1993 New York Southern District Complaint asserts immediately the action arose under the Fifth and Fourteenth Amendments to the Constitution of the United States, and that impaired Constitutional rights to Due Process and Equal Protection were specifically protected by the United States Supreme Court doctrines enunciated in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., impact various aspects. The Complaint and its Exhibits A, B and C extensively and meticulously illuminate various kinds of ERISA and RICO violations, including a substantial, clear chronology of repeated predicate acts and proof of an indisputable, massive, willful Rule 60 (b) (6) ongoing concealment fraud on the New York Southern District Court and petitioner Rhoda Grossbard, commencing with her original federal action, dismissed without prejudice for lack of complete diversity, before, at respondents' invitation, she sued them in New Jersey.

After exhibiting extraordinary in person partiality to respondents' same lead New York attorney representing them since 1981, the District Court judge, despite repondents having not answered, flatly refused to permit submission of any amended complaint (concerning, among other things, concealment of ERISA and RICO violations and on-going cover-up frauds by respondents and their attorneys) after petitioners had contacted high-ranking United States Labor Department ERISA and other federal enforcement attorneys. Petitioners brought out these violations of Federal Rules of Civil Procedure Rule 4, and 28 U.S.C. § 455(b)(1) on pages 12 and 23 of their Second Circuit May 28, 1994 Brief and page 5 of their July 14, 1994 Reply Brief, to no avail.

Among other aspects, this matter concerns looting of assets, in amounts exceeding tens of millions of dollars in value (including assets the respondents flatly admitted stealing in New

Jersey court filings), and massive, repeated frauds by the respondents, their accountants and attorneys (including a bogus, sham, fraudulent alleged counterclaim, a fake will, and a fabulously fraudulent, inherently contradictory cover story, concocted using transparently fabricated, pre-signed-in-blank typing paper and business forms, composed by their first and still current lead New York lawyer, to facilitate, conceal and mischaracterize their intertwined looting schemes and associated repeated extortion behavior).

The January 14, 1993 Complaint, and its meticulously arranged, separately bound, Exhibits A, B and C, comprise a record so clear, complete, comprehensive and carefully compiled that, quite contrary to the arbitrary erroneous District Court Opinion and Order, NO COMPLAINT CONFUSION ABOUT THESE DEFENDANTS, THEIR ONGOING UNLAWFUL BEHAVIOR AND THIS CASE IS ACTUALLY POSSIBLE.

The Complaint's exhibited affidavits (and their supporting exhibits) trace long patterns of wanton, willful and extremely malicious unlawful behavior by the individual respondents against their now deceased elder brother Jules Grossbard. Initiated after Jules Grossbard was debilitated by a serious heart attack, and intensified after he was confirmed aphasic, paralyzed and totally disabled from a massive stroke, confining him to the New York nursing home where he died, this behavior includes a vicious string of predicate acts, constituting particularly egregious civil racketeering behavior and obvious ERISA violations (the totality of which has only partially emerged, due to respondents' undenied concealment frauds). One example: respondents intentionally, surreptitiously cancelled, and then concealed that they had cancelled, a small ERISA group life insurance policy covering the life of Jules Grossbard, while he was alive in the New York nursing home, AFTER they confirmed he was in fact aphasic, paralyzed and totally disabled.

The accurate caption for the matter below, appearing on petitioners' January 14, 1993 New York Southern District Complaint and all of petitioners' subsequent submissions within the Second Circuit was, despite petitioners' repeated objections, variously modified improperly by omissions on certain respondent submissions, docket entries, and the September 20, 1994 final Order of the Court of Appeals for the Second Circuit, whose Clerk had originally ordered conformance to the District Court caption. Ultimately, a November 8, 1994 caption-corrected Second Circuit docket page was mailed to all parties by the Second Circuit Clerk (Pet. App.1A).

The original District Court's 1993 Docket Sheet caption omission of " and IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED " was important because it created and perpetuated an embedded error in the Second Circuit official record going to the core of both the substantial and procedural case history.

Specifically, two actions consolidated in New Jersey's Superior Court. For an accounting, discovery and distribution from the estate of Jules Grossbard's mother Rose Grossbard, which had been totally looted of everything by his younger brothers, including her one-third of the stock in President Container, Inc. and its derivative entities; and the second action, consolidated in Bergen County at the respondents' request, concerning, among other things, repeated extortion efforts by the respondents, and massive frauds and thefts perpetrated on the aphasic, paralyzed, totally disabled Jules Grossbard and his wife Rhoda Grossbard, relating to Jules Grossbard's life-time employment contract with President Container, Inc., and his option on a different one-third interest in President Container, Inc. and its derivatives owned by Marvin and George Grossbard.

Surfacing fabricated promissory note forms (originally signed in blank by Rhoda Grossbard's deceased husband Jules for

financing securities transactions and previously stolen by the respondents from his President Container office), 7 years after he was confirmed aphasic, paralyzed and totally disabled, the defendants belatedly introduced in New York's Supreme Court, in an action being discontinued, a bad faith bogus counterclaim they knew could not exist as a matter of law in any jurisdiction, in order to create a procedural sham in New Jersey's Bergen County Superior Court. The individual respondents had at first denied any New York jurisdiction and repeatedly invited Rhoda Grossbard to sue them in New Jersey, before in bad faith reversing their jurisdictional argument when she accepted their invitation.

The consolidated actions were dismissed without prejudice by New Jersey's then Bergen County Chancery judge and unconstitutionally directed back to New York's courts. This 1987 dismissal occured AFTER the issuing Bergen County Chancery judge had been notified by New Jersey's Supreme Court of his mandatory retirement for repeated judicial incompetence. Chronologically, petitioner Rhoda Grossbard, a New York citizen in New Jersey's courts, was his last victim.

The aberrant 1987 opinion recognized, for the first time, the petitioners' previously illuminated and reiterated assertion respondents used fraudulent documents, fabricated on presigned forms and otherwise blank paper (originally raised in petitioner's obviously unread July 29, 1983 New Jersey Reply Certification with exhibits), yet abdicated New Jersey's jurisdiction over the consolidated matter and directed it back to the courts of New York, the citizenship state of Rhoda Grossbard and her deceased husband Jules.

New Jersey's Superior Court, Appellate Division modified this unconstitutional Chancery decision to make it slightly less unconstitutional, by agreement with recognition of an overall controversy and addition of a specific abdication of New Jersey's exclusive constitutional jurisdiction over the looted New Jersey

estate of Rose Grossbard (which had been created when Marvin and George Grossbard, assisted by certain President Container employees, surreptitiously probated a fake, cosmetic will for Rose Grossbard in New Jersey's Bergen County, AFTER they personally looted it of her one-third stock interest in President Container, Inc. and its derivatives).

Probating of the cosmetic, fake will in Bergen County, New Jersey was done because respondents Marvin and George Grossbard were fully aware of Rose Grossbard's genuine will, drafted for probate in New York by her deceased New York lawyer of many years, bequeathing her one-third stock interest in President Container, Inc. and its complex of derivative entities and properties to her eldest son Jules Grossbard, who never recovered from the stroke that left him aphasic, paralyzed and totally disabled in the New York nursing home. The huge cumulative New York nursing home bill for Jules Grossbard's care was never paid by the repondents, despite written contractual and oral promises, resulting in a very large outstanding judgement in New York against respondent Rhoda Grossbard by the nursing home. Petitioners' ongoing litigation expenses, in three jurisdictions, resulting from respondents unlawful behavior, became insufferable years ago.

After exhausting her remedies in New Jersey, Rhoda Grossbard petitioned New York's highest courts, which refused to accept New Jersey's abdicated jurisdiction, resulting in petitioners' January 14, 1993 New York Southern District Complaint. It was referred by the Clerk to District Judge William C. Conner, who had without prejudice dismissed petitioner Rhoda Grossbard's original 1981 federal complaint for lack of complete diversity (the real, New York franchised, President Container, Inc. was then, and still is, a New York corporation, while the other respondents are New Jersey persons).

At the time of the original 1981 federal action (which was commenced without the knowledge of petitioner David Gordon,

who was then working in Los Angeles, California) neither petitioner was aware a second, secret, bogus New Jersey President Container, Inc., a non-existent entity whose phony New Jersey seal (copies of which, accompanied by 1976 signatures of respondents George Grossbard and Marvin Grossbard's wife Beatrice, from Bergen County New Jersey real estate records, are reproduced on page 7 of petitioners' January 14, 1993 federal complaint) and feigned existence the respondents had used to conceal their looting of at least $400,000 of the cash and cash proceeds of publicly traded securities in Rose Grossbard's estate.

The existence, purpose and activity of this concealed looting mechanism is further extensively documented in David Gordon's April 1991 Affidavit to New York's Court of Appeals and its exhibits of additional New Jersey public record real estate documents (accidentally discovered during a 1991 public records search) and specific legended color photographs, among the many other documents in the Exhibit A volume to petitioners' January 14, 1993 federal complaint. Contrary to the misdated District Court Opinion and Order, actually filed January 10, 1994, petitioners' complaint did NOT argue that the real, New York State franchised President Container, Inc. was incorporated in New Jersey. Rather, that all the exhibited indisputable proof concerning this particular secret, New Jersey looting mechanism and its bogus seal (all of which respondents' same lead New York counsel since 1981 had full knowledge of then), was, among other things, part of a larger Rule 60(b)(6) concealment fraud.

Petitioners, who properly and timely moved, in fully, meticulously memorialized procedure in all jurisdictions, including New York, to preserve all statute of limitation rights and prevent any substantive forfeiture of claims (including frightfully expensive representation by one of New Jersey's largest and most respected law firms) were shocked to find the District Court's January 10, 1994 Opinion and Order (Pet. App. 5A) was constructed from a

truly arbitrary, convoluted tautology mix of two sources: first, a totally inapplicable concept, never alleged and nowhere appearing in this matter, the misnomered concept of so-called " state action " by private parties (at the Second Circuit's September 19, 1994 tape-recorded oral argument, petitioner David Gordon specifically noted the section the inapplicable " state action " type cases had been lifted from in Treatise On Constitutional Law, by Rotunda and Nowak, a section adjacent to, but quite distinct from the professors' chapter on " THE RIGHT TO JUDICIAL PROCESS-ACCESS TO THE COURTS," which, from its 1986 appearance, has been founded on the Logan case). The second source for the January 10, 1994 District Court Opinion and Order was the respondents' pervasively fraudulent July 23, 1993 Motion To Dismiss submission, which was so fraudulent and frivolous that respondents' New York attorney elected to omit from submitting to the Second Circuit, as part of his June 1994 Supplemental Appendix, a July 1993 Affidavit of respondent Marvin Grossbard declaiming any knowledge of the above-referenced, bogus corporate seal for the non-existent, second New Jersey President Container entity, used to loot deceased Rose Grossbard's cash and negotiable securities proceeds (despite contiguous 1976 signatures of his wife Beatrice Grossbard and brother, respondent George Grossbard).

Coupled to a separate premise that no " government action " was involved with the decisions of the highest courts of New Jersey and New York in this matter, the January 10, 1994 District Court dismissal with prejudice Order (Pet. App. 5A), (summarily affirmed by the unpublished, September 20, 1994 Second Circuit Order (Pet. App. 3A), contradicts itself and is otherwise internally inconsistent, conflicts with the factual record, precedent and statute, and is disconnected from reality e.g. the highest courts of New Jersey and New York are indisputably parts of those states' governments, contrary to the January 10, 1994 dismissal Order. In short, the January 10, 1994 District Court

Order, and September 20, 1994 Second Circuit Court of Appeals Order, as noted above, are truly " arbitrary " decisions within the meaning of United States v. Carmack, 329 U.S. 230, 243-44 n.14 (1946), resulting in a perpetuation of petitioners' denied access to judicial process, rights protected by the Logan v. Zimmerman doctrines. Despite exhausted remedies in New Jersey, New York and the Second Circuit, this matter has still not been heard on the merits in any jurisdiction.

The January 14, 1993 Southern District Complaint requested, verbatim, the exact same hearing-on-the-merits relief requested and arbitrarily denied at all levels of New Jersey's courts, jurisdictionally denied by New York's highest courts, and finally arbitrarily denied by the New York Southern District Court on January 10, 1994 and the Court of Appeals for the Second Circuit on September 20, 1994.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Confirms A Denied Access To Judicial Process Result That Conflicts With Logan v. Zimmerman, 455 U.S. 422 (1982), And Decisions In At Least Four Other Circuits

The following six decisions support petitioners' argument below concerning denied access to judicial process and the resulting deprivation of fundamental rights to Equal Protection and Due Process:

Save Our Dunes v. Alabama Dept. of Environmental Management, 834 F.2d 984 (11th Cir. 1987) (See esp. 834 F.2d at 986 n.2 and discussion pp.986-89)

Reshard v. Britt, 839 F.2d 1499 (11th Cir.1988)

Ambus v. Granite Bd of Educ., 975 F.2d 1555 (10th Cir. 1992)

Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985, cert. denied, 474 U.S. 1054, 1986)

Watts v. Burkhart, 854 F.2d 839 (6th Cir. 1988)

Morrison v. Lipscomb, 877 F.2d 463 (6th Cir. 1989)

II. The Decision Below Conflicts With Decisions Of Other Courts of Appeals On A Second Recurring Logan Concept

The Fourth, Fifth, Sixth and Seventh Circuits have interpreted Logan broadly to support a rule against arbitrary state decisions. The Sixth Circuit, for instance: in Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985, cert. denied , 474 U.S. 1054, 1986), the court relied on Logan in holding that a state decision violated due process because a state agency had " wilfully " refused to follow state law. It was thus unconstitutionally arbitrary, which is the only way to describe the decisions in the instant matter of New Jersey's courts (dealing with petitioner Rhoda Grossbard's attempts to secure a hearing on the merits of her New Jersey consolidated claims - in light of the subsequent refusal of New York's highest courts to accept New Jersey's abdication of its jurisdiction over the inextricably intertwined estate of Rose Grossbard). Logan itself, of course, also guarantees the right of access to judicial process at a meaningful time in a meaningful way.

In contrast, the First Circuit has repeatedly ruled that Logan not be interpreted to support a rule against arbitrary state decisions deviating from state law.

Realistically, the September 20, 1994 Second Circuit summary decision below, because it specifically endorses the arbitrary January 10, 1994 New York Southern District opinion (which is published and will be cited despite conflicting with the factual record, precedents and statutes, and contradicting itself), is inherently in conflict with both the narrow Logan interpretations of

the First Circuit and the broad interpretations of the Fourth, Fifth, Sixth, and Seventh Circuits.

III. The Decision Below Is Dangerous Because It Emanates From The Second Circuit And Will Be Cited To Reference The Published, Arbitrary, Underlying Opinion Protecting Looters

The decision below absolutely immunizes admitted ERISA and concealment fraud looters of millions of dollars.

The basic factual record of respondent wrongdoing, specifically documented in petitioners' January 14, 1993 federal complaint and its exhibits, is on its face so blatant that separate federal enforcement attorneys, in different agencies, instantly labelled the respondents' long history of frauds, thefts and extortion ERISA and civil RICO violations.

That the Second Circuit decision below will, despite being unpublished, nevertheless be dangerously cited to reference the published, arbitrary, underlying District Court Opinion it specifically endorses is clear. As the authorities tables in petitioners' Second Circuit briefs noted: the published District Court Opinion itself cited a totally non-germane, completely irrelevant case referenced in a " Table Of Decisions Without Reported Opinions " in the Federal Reporter that, having no formal opinion should not, by Second Circuit Rule s 0.23, 28 U.S.C.A. have been cited or otherwise used in an unrelated case.

The underlying January 10, 1994 District Court Opinion is sure to replicate in various forms, be widely exploited repeatedly to insulate other ERISA and concealment fraud looters, and thereby undermine the integrity of ERISA and other protective economic law nationwide. It will also weaken and encourage flouting of Rule 60(b)(6).

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiori on both of the questions presented.[1]

Respectfully Submitted,

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December 1994

[1] If the Court elects not to address the issues presented at this time, it is requested that the writ issue and the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinion in Logan, supra.

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Proceedings include all events.
94 - 7150 Grossbard, et al v. President, et al
Official Caption 1/
Docket no. (s) : 94- 7150

RHODA GROSSBARD; RHODA GROSSBARD, Conservator of the property of Jules Grossbard; DAVID GORDON; DAVID GORDON, Attorney in fact for Rhoda Grossbard,

Plaintiffs - Appellants,

v.

PRESIDENT CONTAINER, INC., MARVIN GROSSBARD; GEORGE GROSSBARD; MARVING & GEORGE GROSSBARD; As executors of the estate of Rose Grossbard; JILLDARVY REALTY CORPORATION.

Defendants - Appellees,

IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.

Authorized Abbreviated Caption 2 /
Docket no. (s) : 94 - 7150
GROSSBARD V. PRESIDENT CONTAINER

1/ Fed. R. App. P. Rule 12(a) and 32(a).
2/ For use on correspondence and motions only.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
Clerk

Date: November 8, 1994

Hutton, Ingram, Yuzek,
Gainen, Carroll & Bertolotti
250 Park Ave.
New York, NY 10177

Re: Grossbard v. President Container
Docket No: 94-7150

Dear Counsel:

Enclosed is a copy of the caption page which has recently been change in the above referenced appeal.

In the event that your brief has already been submitted, please be advised that the cover of the brief must be altered to reflect the change in official caption.

Sincerely,
GEORGE LANGE III, Clerk

/s/ Frank Perez
Frank Perez
Deputy Clerk, USCA

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Caption Amended

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September, one thousand nine hundred and ninety-four.

Present:

Honorable George C. Pratt
Honorable Pierre N. Leval
Honorable Guido Calabresi
Circuit Judges.

RHODA GROSSBARD, Conservator of the property of Jules Grossbard, DAVID GORDON, Attorney-in-fact for Rhoda Grossbard,

Plaintiffs-Appellants,

v.

PRESIDENT CONTAINER, INC., MARVIN GROSSBARD, GEORGE GROSSBARD, MARVIN & GEORGE GROSSBARD, As executors of the estate of Rose Grossbard, JILLDARVY REALTY CORPORATION,

ORDER
94-7150

Defendants-Appellees,

and

IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.

Appeal from the United States District Court for the Southern District of New York (William C. Conner, Judge).

This cause came on to be heard on the transcript of record from the United States District Court and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the ruling of the district court is affirmed.

We affirm Judge Conner's order of dismissal based on the absence of a properly pleaded basis of federal jurisdiction, for the reasons given by him. To the extent plaintiffs now seek to rely on jurisdictional bases not presented to the district judge; they may not do so.

/s/ George C. Pratt
Hon. George C. Pratt, U.S.C.J

N.B. THIS SUMMARY ORDER SHALL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

/s/ Pierre Leval
Hon. Pierre N. Leval, U.S.C.J

/s/ Guido Calabresi
Hon. Guido Calabresi, U.S.C.J

UNITED STATES DISTRICT COURT (Filed Jan. 20, 1994)
SOUTHERN DISTRICT OF NEW YORK

RHODA GROSSBARD, RHODA GROSSBARD, Conservator of the Property of JULES GROSSBARD, DAVID GORDON, DAVID GORDON Attorney-in-Fact for RHODA GROSSBARD,	:
Plaintiffs,	:93 Civ. 0435 :(WCC)
-against-	:
PRESIDENT CONTAINER, INC., MARVIN GROSSBARD, GEORGE GROSSBARD, MARVIN GROSSBARD AND GEORGE GROSSBARD, as Executors of the Estate of ROSE GROSSBARD, JILLDARVY REALTY CORPORATION,	: 72598 : OPINION :AND ORDER
Defendants,	:
and	:
IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.	:

APPEARANCES:

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CONNER, D.J.:

Plaintiffs Rhoda Grossbard and David Gordon bring this action pro se against President Container, Inc., (" PCI "), and Marvin and George Grossbard (" the Grossbards ") individually and as executors of the estate of Rose Grossbard. Twelve years ago we dismissed this family dispute for lack of jurisdiction. Nothing has changed in the past twelve years to make us rule differently today. Hence defendants' current motion to dismiss for lack of jurisdiction is once again granted and the Complaint is dismissed with prejudice. Defendants' motion for sanctions under Rule 11 of Federal Rules of Civil Procedure, however, is denied.

BACKGROUND

In 1981 plaintiff Rhoda Grossbard filed claims in this Court for breach of contract, false representation, conversion and duress in connection with the settlement of prior dispute against PCI and the Grossbards. We dismissed the complaint on jurisdictional grounds for lack of diversity of citizenship.

In the twelve years since our first dismissal, plaintiff has filed similar complaints against the same defendants in New York and New Jersey state courts to no avail. Plaintiff now returns to this Court pro se with her son, David Gordon, as a second plaintiff. While the complaint is at best confusing, it appears that plaintiffs are incorporating the original and amended complaints filed in New Jersey Superior Court and New Jersey Chancery Court, which assert claims for breach of contract and extortion and request an accounting of the estate of Rose Grossbard.

For the reasons discussed below, defendants' motion to dismiss is granted, but their motion for Rule 11 sanctions is denied.

DISCUSSION

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A. Diversity Jurisdiction Under 28 U.S.C. § 1332

As explained in our prior opinion, we do not have subject matter jurisdiction under 28 U.S.C. § 1332 because there is not complete diversity of citizenship. Plaintiff Rhoda Grossbard is a citizen and resident of New York. Defendant PCI is incorporated in New York, and thus is also a citizen of New York. Hence there is no diversity and this court lacks jurisdiction. See Grossbard v. President Container, Inc., No.81-1704, slip op. at 3 (S.D.N.Y. Sept .21, 1981) (citing State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967)).

Plaintiffs argue that PCI is not a resident of New York because, contrary to what this Court found in 1981, PCI is incorporated in New Jersey, not New York.[1] Plaintiffs point to three documents signed in 1965 by George Grossbard, President of PCI, which bear the impression of a seal reading "President Container, Inc., Incorporated New Jersey." Rather than producing these documents in full, plaintiffs submit photocopies of the lower portions revealing only Mr. Grossbard's signature and the purported seal.

In response, PCI submits Certification by the Secretary of State of the state of New York verifying PCI's status as a New York Corporation, and a Certificate of Standing issued by the state of New Jersey which confirms that PCI is a foreign corporation in New Jersey. In addition, PCI submits an affidavit by Marvin Grossbard, President of PCI, stating that PCI was incorporated in 1955 in the state of New York, and that while PCI has been

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[1] Plaintiff now apparently withdraw this argument, but we are addressing the issue because it is in the Complaint.

qualified to do business in New Jersey since 1966, it has never been incorporated in New Jersey.

We are convinced, just as we were twelve years ago, that PCI is in fact a New York Corporation. Plaintiffs have not produced any records from the state of New Jersey or New York contradicting the certifications submitted by PCI. And even if PCI did use at one time, whether inadvertently or intentionally, a seal indicating that it was a New Jersey Corporation, such conduct could not change its actual state of incorporation for purposes of diversity. As the official records reveal, PCI is in fact incorporated in the state of New York, and because plaintiff is also a citizen of New York, there is no diversity of citizenship.

B. Federal Question Jurisdiction Under 28 U.S.C. § 1331

Pursuant to 28 U.S.C. § 1331, district courts have jurisdiction over " all civil actions arising under the Constitution, laws, or treaties of the United States. " The instant Complaint asserts that the action " arises under the Fifth and Fourteenth Amendment, Section 1, to the Constitution of the United States. " Compl. ¶ 1. Plaintiffs suggest that their constitutional rights were implicated when " plaintiff was unconstitutionally denied access to the proper forum in New Jersey, sent back to New York with an abdication of jurisdiction by New Jersey courts, which New York's courts refused to recognize or even comment on, and has never had her case heard on the merits anywhere. " Compl. ¶ 9.

Plaintiffs fail to appreciate the fundamental concept of " state action." The Fifth and Fourteenth Amendments are implicated, and hence confer jurisdiction, only when government action is involved. Public Utilities Commission v. Pollak, 343 U.S. 451, 461 (1952); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 924 (1982). The instant case is a dispute between private parties. While plaintiffs argue that they have been unfairly treated

by various state officials, none of these officials is named in the instant case. Rather, the Complaint alleges that PCI and the Grossbergs breached a contract and committed various frauds against plaintiffs. This alleged conduct by private parties does not constitute " state action." See, e.g., Kops v. New York Telephone, 456 F. Supp. 1090, 1093-94 (S.D.N.Y. 1978), aff'd, 603 F.2d 213 (2d Cir. 1979). Plaintiffs cannot simply invoke the federal constitution in a private action and expect this assertion to confer jurisdiction on this Court. There is no federal question involved in this case and hence no jurisdictions based on § 1331.[2]

II. Motion for Rule 11 Sanctions.

The defendants request that plaintiffs be sanctioned under Federal Rule of Civil Procedure 11 because the instant Complaint is " just the latest chapter in a long sag of baseless and frivolous claims brought against defendants over a period of more than 12 years. "

While we agree that the filing of the instant Complaint constituted a waste of time for defendants and this Court, we give deference to the pro se status of plaintiffs. Moreover, because we are dismissing the case on jurisdictional grounds we are not in a position to judge the frivolity of the claims alleged. Hence we decline to issue sanctions, but dismiss the Complaint with prejudice.

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[2] Because we are dismissing the Complaint for lack of jurisdiction, we find it unnecessary to address defendants' alternative arguments, although there are obvious statute of limitation problems.

CONCLUSION

The Complaint is dismissed with prejudice because this Court lacks subject matter jurisdiction. Defendant's Motion for Sanctions under Federal Rule of Civil Procedure 11, however, is denied.

SO ORDERED

Dated: January 7, 1993
New York, New York

/s/ William C. Conner
United States District Judge

UNITED STATES CONSTITUTION AND STATUTES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE ANNOTATED, TITLE 29.
LABOR
CHAPTER 18 - EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER 1 - PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE A - GENERAL PROVISIONS

Current through P.L. 103-354, approved 10-13-94, ERISA § 1003. Coverage, provides in part:

> (a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this

subchapter shall apply to any employee benefit plan if it is established or maintained -

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
(3) by both.

PUB.L. 93-406, TITLE 1, § 4, SEPT. 2, 1974, 88 STAT. 839. AS AMENDED PUB.L. 101-239, TITLE VII, § 789(A)(1), DEC. 19, 1989, 103 STAT. 2445.

THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO), 18 U.S.C. § § 1961 - 1968 (1982), WAS ENACTED AS TITLE IX OF THE ORGANIZED CRIME CONTROL ACT OF 1970, PUB.L. 91-452 (1970).

The essence of civil RICO law is represented by the following provisions of Sections 1961, 1962, and 1964:

The private right of action is conferred by Section 1964(c) of the Act which says, " (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. "

Section 1962 of the Act, labeled " Prohibited Activities ," says in part:

" (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income in acquisition of any interest in, or the establishment or

operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . . "

In Section 1961 of the Act Racketeering activity is defined as any one of four classes of enumerated offenses; and a " pattern of racketeering activity, " as defined in Section 1961(5) " requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity. "